TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 206.

AUGUST J. HENKEL, PLAINTIFF IN ERROR,

vs.

THE CITY OF CINCINNATI ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED FEBRUARY 10, 1899.

(17,292.)

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INDEX.

	Original.	Print.
Caption	*a*	1
Proceedings in court of common pleas	1	1
Petition	1	1
Answer	6	4
Transcript of docket and journal entries	7	5
Decree	8	5
Appeal bond	8	5
Proceedings in circuit court of Hamilton Co	10	6
Transcript of docket and journal entries	10	6
Decree	10	6
Order allowing bill of exceptions	10	7
Bill of exceptions	11	7
Agreed statement of facts	11	7
Exhibit A—Ordinance No. 4303, to condemn property for the purpose of opening Hopson street from Molitor street to Wayne street	13	8
B—Ordinance No. A 594, to assess a special tax on real estate bounding and abutting on Hopson street from Molitor street to a point 100 feet north	14	9
C—Minutes of the board of public improvements	16	10
Judge's certificate to bill of exceptions	19	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 8, 1899.

	Original.	Print.
Petition in error	20	12
Waiver of summons in error	22	14
Præcipe for summons in error	23	14
Summons in error	23	14
Sheriff's return	24	15
Clerk's certificate to printed record	25	15
Transcript of docket and journal entries	26	16
Order advancing cause	27	17
Order granting temporary restraining order	27	18
Decree	27	18
Certificate of Federal question	27	18
Clerk's certificate to docket and journal entries	28	18
Assignment of errors	29	19
Exhibit A—Plat of property on Hopson street	34	21
Petition for writ of error	36	21
Order allowing writ of error	38	22
Writ of error	39	23
Citation	41	24
Service of citation	42	24
Bond on writ of error	44	25

a Supreme Court of Ohio.

August J. Henkel, Plaintiff in Error,
vs.
The City of Cincinnati, a Municipal Corporation; D. W. Brown, Auditor of the City of Cincinnati; Henry M. Ziegler, Treasurer of the City of Cincinnati; John Hagerty, Auditor of Hamilton County, Ohio; Leo Schott, Treasurer of Hamilton County, Ohio, Defendants in Error. } No. 5712.

Record.

Louis J. Dolle, Donaldson & Tussing, attorneys for plaintiff in error.

Ellis Kinkead, corporation council for the city of Cincinnati.

Filed Oct. 28, 1897, in supreme court of Ohio.

J. B. ALLEN, *Clerk.*

1 Court of Common Pleas, Hamilton County, Ohio.

August J. Henkel, Plaintiff,
vs.
The City of Cincinnati, a Municipal Corporation; D. W. Brown, Auditor of the City of Cincinnati; Henry M. Ziegler, Treasurer of the City of Cincinnati; John Hagerty, Auditor of Hamilton County, Ohio; Leo Schott, Treasurer of Hamilton County, Ohio, Defendants.

Petition.

Filed January 17, 1894.

Plaintiff says that the defendant, The City of Cincinnati, is a municipal corporation of the first grade of the first class under the laws of the State of Ohio; that D. W. Brown, is the auditor of the city of Cincinnati; that Henry M. Ziegler, is the treasurer of the city of Cincinnati; that John Hagerty, is the auditor of Hamilton county, Ohio, and that Leo Schott, is the treasurer of Hamilton county, Ohio.

That on February 1st, 1890, he was the owner in fee-simple of a lot of land described as follows: Commencing at a point in
2 the northwest corner of Molitor and Bishop streets, and thence running west along the north line of Molitor street two hundred and twenty-eight and seventy-two hundre-ths (228.72) feet to the west line of the Corry track, and which line is the east line of Burnet Woods park; thence north and along the east line of said Burnet Woods park one hundred (100) feet; thence east and paralleled to Molitor street two hundred and twenty-eight and seventy-two hundre-ths (228.72) feet; thence south on a line par-

alleled with the east line of said Burnet Woods park one hundred (100) feet to the place of beginning.

That prior to the day named, his said property abutted that owned by the city of Cincinnati, and known as the Burnet Woods park. That Hopson street extended from the south line of Wayne street, now known as Rochelle street, to plaintiff's north line, and that plaintiff's premises were so located that the north line of his property was the south line of Hopson street, and prevented the traveling public from reaching Molitor street over Hopson going from Rochelle street south.

That in February, 1890, corporation council notified plaintiff of the city's intention to appropriate for the purpose of opening Hopson street, and for street purposes, the following portion of the land above described, to wit:

Commencing at a point in the west line of Corry tract, also the east line of Burnet Woods park where the north line of Molitor street, as laid out in Corry's subdivision, joins said line; thence east on the north line of Molitor street thirty (30) feet to a point; thence north from these two points between the west line of Corry tract to a line thirty (30) feet east therefrom at right angles one hundred (100) feet more or less, to the north line of lot owned by plaintiff.

Action was brought by the city of Cincinnati against this
3 plaintiff, known as cause No. 4592, in the probate court of Hamilton county, Ohio; that such proceedings were had that on April 11th, a verdict was rendered in favor of the plaintiff finding the value of the land desired, and to be appropriated at forty ($40) dollars per front foot on Molitor street, and that on May 10th, 1890, judgment was rendered on said verdict.

That on January 21st, 1891, the amount of the verdict was paid, and entry was satisfactorily given. That the costs of said action were one hundred and seven dollars and eighty cents ($107.80).

Plaintiff says that the block of land in which his said lot is located is bounded on the north by Rochelle street, on the east by Bishop, on the south by Molitor, on the west by Hopson street, and that the west line of Hopson street is the east line of Burnet Woods park, owned by said city of Cincinnati, and used for park purposes.

Plaintiff further says that the total costs of the judgment rendered in his favor in the action above stated, amounted to one thousand two hundred ($1,200) dollars; that the city of Cincinnati through its board of administration on the 21st day of September, 1892, passed an assessing ordinance, and caused the same to be published, whereby the city of Cincinnati assessed one-half of the entire costs and expenses of obtaining the title and ownership to said property upon the remainder of his said property.

Plaintiff says that said Hopson street from Wayne (now Rochelle) to Molitor streets has not been improved, and that he has been deprived of the title and possession to his property to the strip of thirty (30) feet by the city, for which he received said sum of one thousand two hundred ($1,200) dollars; that all the other lands front-
4 ing on Hopson street were jointly interested in the opening and extending of Hopson street, but that none of the property

was assessed any part or portion for the amount which he received and the cost of the condemnation proceedings; that said assessment was by said assessing ordinance made payable at the office of the auditor of the city of Cincinnati in ten equal installments, with five per cent. interest per annum payable annually, and by said assessing ordinance said auditor of the city of Cincinnati was directed to certify said assessment to the auditor of the county of Hamilton if the same was not paid within twenty days after the 21st day of September of each succeeding year. That the first assessment was due and payable September 21st, 1893; that he refused to pay the same, and that the auditor of the city of Cincinnati certified the amount, to wit: $117.17 to the auditor of Hamilton county for collection, and that there will become due the succeeding assessments but lesser in amount in each year succeeding until 1903 inclusive, aggregating $910.66.

Plaintiff says that said assessment so made and levied against his property above described, is irregular, illegal and wholly void, in so far as that his said lot was not and is not liable or properly subject to be assessed for and upon the number of feet his said lot abuts Hopson street; that the same fronts on Molitor street; that the assessment is levied for the payment of the strip of land appropriated, and costs incidental to such appropriation, for the property which formerly belonged to him, and that the city by said assessing ordinance now seeks to make him pay three-fourths of the amount which he received for the property, and the expense incidental thereto. That the distance from Molitor to St. Clair street is eight hundred (800) feet; and that the assessment was made without regard to the property which fronts and abuts on both sides of said Hopson street, between Molitor and St. Clair streets, and without regard to the benefits which it conferred upon the property owned by plaintiff and others in said block.

Plaintiff says that the city of Cincinnati has no right or authority to collect the amount which it has assessed against the property of said plaintiff; that D. W. Brown, auditor of the city of Cincinnati, had no right or authority to certify said assessment to the auditor of Hamilton county, Ohio, for collection; that said Henry M. Ziegler, treasurer of the city of Cincinnati, has no right or authority to collect or receive said assessment and those that will hereafter become due, or any portion thereof; that said John Hagerty, auditor of Hamilton county, Ohio, had no right or authority to certify said assessment to the treasurer of Hamilton county, Ohio, for collection; that Leo Schott, as such treasurer of Hamilton county, Ohio, has no right or authority to collect or receive from this plaintiff the amount which the authorities of the city have assessed against his said property as aforesaid.

Wherefore plaintiff prays that the defendant The City of Cincinnati be enjoined and restrained from collecting the amount which it has assessed against his said property; that D. W. Brown, auditor of the city of Cincinnati, as aforesaid, or otherwise, be enjoined and restrained from certifying the amount to the auditor of Hamilton county, Ohio, for collection; that the auditor of Hamilton county

be enjoined and restrained from certifying the amount certified to him by the auditor of the city of Cincinnati to the treasurer of Hamilton county, Ohio; that the treasurer of Hamilton county, Ohio, be enjoined and restrained from the collection of the amount certified to him by the auditor of Hamilton county, Ohio, and that all of said defendants be enjoined and restrained from de-
6 manding or receiving and collecting from him the other assessments as they severally become due, and for such other and further relief as is just and proper in the premises.

LOUIS J. DOLLE,
Attorney for Plaintiff.

Verification attached.

Answer.

Filed February 23, 1894.

Now come the defendants, and for answer to the petition of plaintiffs admit that the city of Cincinnati is a city of the first grade of the first class under the laws of Ohio, and that D. W. Brown is its auditor; that John Hagerty is the county auditor, and Leo Schott treasurer of Hamilton county.

Defendants admit that plaintiff is the owner of the property described in the petition, and that said city condemned by proper legal proceedings the property therein described, and awarded compensation to the property-owners as therein set forth.

Defendants admit that thereafter said city passed an assessing ordinance to pay the costs and expenses of said condemnation, assessing by the front foot one-half the entire costs and expenses of said improvement upon the lots and lands bounding and abutting Hopson street, between Molitor and Wayne streets.

Defendants say that the plaintiff herein is the owner of the lot described in the petition, all of which bounds and abuts upon said Hopson street, between Wayne and Molitor streets, and fronts on Hopson street between the points aforesaid.

Further answering, defendants say that the said assessment is the first and best lien on said lot, and that plaintiff has not paid the same.

7 Defendants deny each and every other allegation in plaintiff's petition contained not herein expressly admitted.

Wherefore, defendants pray that the petition of plaintiff be dismissed at the costs of plaintiff and for all other further and proper relief.

THE CITY OF CINCINNATI,
—— ——,
Corporation Counsel and Attorney for Def'ts.

Verification attached.

Transcript of Docket and Journal Entries to Circuit Court.

Filed December 11, 1894.

1894, Jan. 17.—Min. 163, temp. restraining order allowed, bond $250.00.

Let restraining order issue as prayed for upon plaintiff giving bond to the satisfaction of the clerk of this court in the sum of $250.00.

1894, Jan. 17.—Bond 43, Book 14 in $250.00 given. (See safe.)

1894, Jan. 17.—Summons issued, endorsed, injunction allowed, bond given in $250.00. John B. Peaslee, clerk, by W. H. Sargent, deputy.

1894, Jan. 29.—Summons returned, 1894, Jan. 17th. Served the within-named defendants, The City of Cincinnati, a municipal corporation, by delivering a true copy of this writ with all the endorsements thereon personally to Theodore Horstman, corporation counsel thereof, at 3.30 o'clock p. m. No other chief officer being found; also served D. W. Brown, auditor, at 3.35 o'clock p. m., Henry M. Ziegler, treasurer of said city, at 3.40 o'clock p. m., John Hagerty, auditor, at 3.04 o'clock p. m., and Leo Schott, treasurer of
8 Hamilton county, at 3.05 o'clock p. m., by delivering to each personally a true copy of this writ, with all the endorsements thereon. R. M. Archibald, sheriff, by Robert Sweeny, deputy. Sheriff's fees $3.80.

1894, Feb. 17.—Default for answer.

1894, Feb. 23.—Min. 386, answer of def'ts filed by leave.

1894, Nov. 13.—Min. 1089, final decree, notice of appeal, bond $250.00.

This cause coming on to be heard on the pleadings and evidence and being submitted to the court, on consideration whereof the court find on the issues joined, the equities of the case with the defendant.

It is therefore ordered, adjudged and decreed that the injunction heretofore granted be dissolved and the petition of plaintiff be dismissed at his cost. And plaintiff gives notice of appeal and the court fixes the amount of the appeal bond at $250.00.

1894, Nov. 26.—Bond 118, Book 15 in $250.00 for appeal filed. (See safe.)

Certificate of clerk attached.

Appeal Bond.

Know all men by these presents: that we, August J. Henkel, by Louis J. Dolle, att'y, and Martin Schroeder, of the county of Hamilton and State of Ohio, are held and firmly bound unto city of Cincinnati, D. W. Brown, auditor, and Henry M. Ziegler, treasurer of said city, and John Hagerty, auditor, and Leo Schott, treasurer of Hamilton county, Ohio, in the just and full sum of two hundred and fifty dollars, good and lawful money of the United States of

America; for the payment whereof well and truly to be made unto the said above-named defendants, we do hereby bind our-
9 selves, and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated at Cincinnati, this 26th day of November, anno Domini, one thousand eight hundred and ninety-four.

Whereas, in the term of October, A. D. 1894, of the court of common pleas, held at the court-house in the city of Cincinnati, within and for the county of Hamilton aforesaid, by the consideration of the Honorable M. L. Buchwalter, one of the judges of said court, sitting in separate session, the said above-named defendants recovered an entry against the said August J. Henkel from which said entry the said August J. Henkel has given notice of appeal to the circuit court of Ohio, next to be holden within and for the said county of Hamilton.

Now the condition of the above obligation is such, that if the said August J. Henkel shall prosecute said appeal to effect, and abide and perform the order and judgment of the appellate court, and shall pay all moneys, costs and damages, which may be required of or awarded against him by the said court, then, and in such case, the said obligation to be void and of no effect, otherwise to be and remain in full force and virtue in law.

AUGUST J. HENKEL,
By LOUIS J. DOLLE, *His Att'y.* [SEAL.]
MARTIN SCHROEDER. [SEAL.]

Signed, sealed and acknowledged in the presence of—
W. H. SARGENT.

Filed Nov. 26th, 1894, and approved Nov. 26th, 1894.
JOHN B. PEASLEE,
Clerk Court of Common Pleas, Ham. Co., O.,
By W. H. SARGENT, *Deputy.*

10 Circuit Court, Hamilton County, Ohio.

AUGUST J. HENKEL, Plaintiff in Error,
vs.
THE CITY OF CINCINNATI, a Municipal Corporation; D. W. Brown, Auditor of the City of Cincinnati; Henry M. Ziegler, Treasurer of the City of Cincinnati; John Hagerty, Auditor of Hamilton County, Ohio; Leo Schott, Treasurer of Hamilton County, Ohio, Defendants in Error.

Transcript of Docket and Journal Entries to Supreme Court.

1897—June 14. Min. 174, entry dismissing petition:

This cause coming on to be heard upon the pleadings and the evidence, and being fully argued and submitted to the court; on consideration whereof the court find the equities of the case to be with the defendants.

It is therefore ordered, adjudged and decreed that the petition of the plaintiff be dismissed, and the injunction dissolved at the costs of the plaintiff, to all of which plaintiff excepts.

July 26. Min. 211, entry allowing bill of exceptions to be filed:

Now comes the plaintiff and presents his bill of exceptions, which the court finds has been presented to counsel for the defendant within the time required by statute and which is now allowed, signed, sealed and made part of the record of this cause.

July 26. Min. 211, bill of exceptions filed by leave.

Certificate of clerk attached.

11 *Bill of Exceptions.*

Filed July 26, 1897.

Be it remembered that at the trial of this cause at the January term, A. D. 1897, of the circuit court of Hamilton county, Ohio, before the Honorable Judges Joseph Cox, James M. Smith, and Peter F. Swing, a jury being waived and counsel for the plaintiff and defendant having agreed upon all the facts in this cause to be presented to the court, and having reduced the same to writing, the same was submitted to the court and are in the following words and figures including the exhibits attached to such agreed statement of facts, marked "Exhibits A, B and C."

Agreed Statements of Facts.

It is agreed between counsel for the plaintiff and defendant that the following is a true and correct statement of the facts in this cause, and are submitted to the court for its decision thereon:

I. That prior to February 2d, 1890, the plaintiff was the owner in fee-simple of a lot of land commencing at a point in the northwest corner of Molitor and Bishop streets, and thence running west along the north line of Molitor street two hundred and twenty-eight and seventy-two-hundredths (228.72) feet to the west line of Corry's tract, which west line is the east line of Burnet woods, and thence north and with the east line of Burnet woods one hundred (100) feet, thence east and parallel with Molitor street two hundred and twenty-eight and seventy-two one-hundredths (228.72) feet, thence south on a line parallel with the east line of Burnet Woods park one hundred (100) feet to the place of beginning, so that
12 plaintiff's west line was the east line of Burnet Woods park. The point at which the lines meet is the middle of a proposed street, known as Hobson street, the east half of which from Wayne street south to plaintiff's property, was dedicated by property-owners to the public for street purposes, and the other half of the proposed street still remaining the property of the city.

II. That on the 3d day of February, 1890, the city commenced proceedings in the probate court of Hamilton county, Ohio, known as 4592, against the plaintiff and his wife, under the statute, to assess compensation for a strip of land off of the west portion of the

lot above described, lying immediately next to the Burnet Woods park line in which proceedings a strip of 30 x 100 feet was condemned for street purposes, and compensation by the jury was assessed at forty ($40) dollars per front foot, April 11th, 1890. Such proceedings were authorized by an ordinance hereto attached, and marked "Exhibit A," passed December 31, 1889.

III. On September 21st, 1892, the board of administration passed an assessing ordinance (hereto attached, marked "Exhibit B,") and caused the same to be published, whereby the city assessed one-half of the judgment in favor of plaintiff in the court referred to, the costs of obtaining the same, etc., on the remaining portion of the land belonging to plaintiff and above described, and the other half upon the property known as Burnet Woods park and belonging to the city of Cincinnati.

IV. That the proceedings for the condemnation of the property had for their object the acquiring by the city of the title to the land condemned for street purposes. That since that time the city has sought to improve the strip of land which it acquired under such proceedings for street purposes.

13 The legislation for the improvement of the street having been started in 1892, but delayed on account of the reasons stated in the minutes of the board of improvement of the city of Cincinnati, hereto attached and marked "Exhibit C."

Respectfully submitted.

LOUIS J. DOLLE,
Attorney for Plaintiff.
WM. H. WHITTAKER,
Ass't Corporation Counsel.

EXHIBIT A.

An ordinance, No. 4303, to condemn property for the purpose of opening Hopson street from Molitor street to Wayne street.

Be it ordained by the common council of the city of Cincinnati (two-third of all the members elected to each board concurring and declaring the same to be necessary), That its intention is hereby declared to condemn and appropriate to the public use for street purposes, for the purpose of opening Hopson street, from Molitor street to Wayne street, and it hereby condemns and appropriates to such public use for street purposes, for the purpose of opening Hopson street as aforesaid, the following-described property, to wit: Commencing at a point in the west line of the Corry tract; also, the east line of Burnet Woods park, where the north line of Molitor street, as laid out in Corry's subdivision, joins said line; thence east on the north line of Molitor street thirty (30) feet, to a point; thence north from these two points, between the west line of the Corry tract and a line thirty (30) feet east therefrom at right angles one hundred (100) feet, more or less, to the north line of a lot owned by August J. Henkel.

14 And the solicitor is hereby authorized and instructed to institute the necessary proceedings, and to apply to the court

for an inquiry and assessment of the compensation to be paid for such property.

SECTION 2. The amount so found, together with all costs and expenses of said appropriation and the interest on bonds issued, shall be assessed per front foot upon the lots and lands bounding and abutting upon that part of Hopson street included within the above description, the said lots and lands being hereby declared to be the lots and lands which will be specially benefitted by said appropriation, according to the laws and ordinances on the subject of assessments; the assessments therefor to be payable in ten annual installments, the same to be collected as provided by law and the assessing ordinance hereafter to be passed. And bonds shall be issued in anticipation of such assessment.

SEC. 3. This ordinance shall take effect from and after the earliest period allowed by law.

Passed December 31, A. D. 1889.

GEO. I. KING,
Vice-President Board of Councilmen
CHAS. WUEST,
President Board of Aldermen.

Attest: EDWIN HENDERSON, *City Clerk.*

ja 17-2t.

EXHIBIT B.

An ordinance, No. A 594, to assess a special tax on real estate bounding and abutting on Hopson street from Molitor street to a point 100 feet north.

SECTION 1. Be it ordained by the board of administration of the city of Cincinnati, That there be levied and assessed on each front foot of the several lots and lands bounding and abutting on
15 Hopson street, from Molitor street to a point 100 feet north, the sums hereinafter named, for each and every year, as specified, to wit:

1892. One dollar seven cents one mill and four thousand eight hundred and seventy-five ten-thousan-ths of one mill	$1.0714875
1893. One dollar three cents five mills and seven thousand seven hundred and thirteen ten-thousan-ths of one mill	1.0357713
1894. One dollars no cents no mills and five hundred and fifty ten-thousandths of one mill	1.0000550
1895. Ninety-six cents four mills and three thousand three hundred and eight-eight ten-thousandths of one mill	.9643388
1896. Ninety-two cents eight mills and six thousand two hundred and twenty-five ten-thousandths of one mill	.9286225
1897. Eighty-nine cents two mills and nine thousand and sixty-two ten-thousandths of one mill	.8929062

1898. Eighty-five cents seven mills and one thousand nine hundred ten-thousandths of one mill.... .8571900
1899. Eighty-two cents one mill and four thousand seven hundred and thirty-seven ten-thousandths of one mill ..... .8214737
1900. Seventy-eight cents five mills and seven thousand five hundred and seventy-five ten-thousandths of one mill..... .7857575
1901. Seventy-five cents no mills and four hundred and twelve ten-thousandths of one mill ..... .7500412

To pay the costs and expenses of appropriating property condemned by ordinance No. 4303 of the common council of the city of Cincinnati, passed December 31, 1889, and as awarded in case No. 4592, probate court of Hamilton county.

SEC. 2. That the owners of the several lots and lands upon each front foot of which the sums aforesaid are assessed, shall pay the amount of money by them severally due, in that behalf, to the city auditor, on or before the twentieth day following the day of
16 the final approval of this ordinance, in each of the said several years, and in default of such payment the city auditor shall forthwith certify all unpaid assessments to the county auditor, to be by him placed upon the tax duplicate and collected according to law.

SEC. 3. That the said annual assessments, and all portions thereof, shall be paid into the sinking fund when collected, and shall be applied to the payment of bonds, and interest thereon, already issued in pursuance of ordinance No. A 324 of the board of public improvements, passed June 5th, 1890, as the same shall become due, and to no other purpose whatsoever.

City 2 per cent.....	$29 15
City frontage, 100 feet, at $7.14325	714 32
Private frontage, 100 feet, at $7.14325	714 33
	$1,457 80

Passed September 21, A. D. 1892.

AUG. HERRMANN,
President Board of Administration.

Attest: A. P. BUTTERFIELD,
Clerk Board of Administration. se22.29.

EXHIBIT C.

Minutes of the Board of Public Improvements.

On Sept. 10th, 1890, a petition to improve with macadam Hobson street from Molitor street to St. Clair street was referred to the engineer for verification of the signatures by the board of public improvements.

On Sept. 25th, 1890, it was referred to Mr. Herman, member of the district, by the board of public improvements.

On Jan. 29th, 1891, it was referred by the board of city affairs to Mr. Graydon, committee of the district, for report, consideration, and recommendation.

On May 1st, 1891, it was referred to the city solicitor for opinion as to city frontage.

17 On May 6th, 1891, it was referred to the engineer for investigation, report and recommendation.

On May 12th, 1891, it was filed in the office of the board of — affairs, and the engineer was directed to prepare and submit to the consideration of the board, a resolution declaring it necessary to improve.

The report showed a total frontage of 804 50 feet, three-fourths of which was 603.37 feet, with amount properly signed for of 604 feet. Report of the assistant engineer on the petition.

On Oct. 15th, 1892, Mary Kruse, one of the petitioners, notified the board that she withdrew her signature from the petition to improve Hobson street, for the reason that her property would be damaged.

On Oct. 16th, 1892, the communication was ordered filed, and the engineer directed to stop further improvement proceedings.

Oct. 19th, 1892, a petition was received from Wendell Meyer and others asking that Hobson street be improved with brick instead of macadam, as already ordered, and on motion it was referred to the engineer, for verification of signatures and report.

On Oct. 24th, 1892, it was referred to Mr. Herman for report and recommendation.

On June 26th, 1893, it was returned with the recommendation that the papers be filed; the recommendation was approved.

On November 9th, 1893, a petition for the improvement of Hobson street from St. Clair street to Molitor street with brick, paving, curbs, etc., was referred by the board of administration to the engineer for verification as to signatures, and report.

On December 13th, 1893, it was filed until such time as

18 the petitioners would agree to pay any deficit that may arise by reason of the non-collectibility of the assessment.

On October 10th, 1894, a petition for the improvement of Molitor street between the same points by paving with brick and macadam, was referred by the board of administration on August 10th, 1894, to the engineer for verification of signatures, and report.

On August 15th, 1894, it was referred to the engineer for investigation, verification and report.

On August 15th, 1894, it was referred to Mr. Herman, member of the district, for report.

On August 18th, 1894, the engineer, to whom was referred for investigation *for* signatures and report the petition for the improvement, returned the same with the report that the signatures correctly represented 479.50 feet of a street assessable for a frontage of 1,669 feet, of which 864.50 feet *was* owned by the city, Burnet Woods park, having a frontage exclusive of said park property of 804.50 feet; frontage correctly signed 479.50 feet, and the frontage informally signed being 125 feet, submitting a plat showing tax valua-

tion of abutting property and estimating the cost per abutting foot to property-owners, $8.90 for macadam and $10.25 for brick, calling attention to the fact that the petition asks for the improvement of Hobson instead of Hopson street. On motion was referred to Pres. Herrman for investigation and report.

November 20th, 1895, recommendation was approved and petition ordered filed.

May 21st, 1896, a petition was presented to the board of administration for the improvement of Hobson street between Molitor street and St. Clair street.

The engineer was directed to prepare a resolution and specifications for the improvement, by grading, setting curbs and
19 crossings, laying the roadway with macadam, etc.; and a resolution was passed on that date, declaring the necessity of the improvement, and on Nov. 27th, 1896, an ordinance to improve was passed—to improve Hobson street between Molitor and St. Clair, including the part condemned by the city in case 4592, above referred to.

And the plaintiff and the defendant- rested their cause upon the foregoing statement of facts, and this was all the evidence offered by either party in this cause. And the court, on the 14th day of June, 1897, minute 174, adjudged and decreed that the petition of plaintiff be dismissed and the injunction dissolved at the cost of plaintiff. To all of which the plaintiff excepted and tenders this, his bill of exceptions, which is allowed, signed, sealed, and ordered to be made part of the record, this 26th of July, 1897.

J. M. SMITH, [SEAL.]
P. F. SWING, [SEAL.]
Judges Circuit Court.

20 Supreme Court of the State of Ohio.

AUGUST J. HENKEL, Plaintiff in Error,
vs.
THE CITY OF CINCINNATI, a Municipal Corporation; D. W. BROWN, Auditor of the City of Cincinnati; Henry M. Ziegler, Treasurer of the City of Cincinnati; John Hagerty, Auditor of Hamilton County, Ohio; Leo Schott, Treasurer of Hamilton County, Ohio, Defendants in Error.

Petition in Error.

Filed September 13, 1897.

Now comes the plaintiff in error and avers that since the commencement of this action, H. P. Boyden was duly elected and qualified and is now acting as auditor of the city of Cincinnati, vice the defendant herein, D. W. Brown, whose term of office has expired; that E. O. Eshelby was duly elected and qualified and is now acting as the treasurer of said city of Cincinnati, vice the defendant herein, Henry M. Ziegler, whose term of office has expired, that Eugene L. Lewis was duly elected and qualified

and at present is acting as auditor of Hamilton county, Ohio, vice the defendant herein, John Hagerty, whose term of office has expired; that Tilden R. French was duly elected and qualified and at present is acting as treasurer of Hamilton county, Ohio, vice the defendant herein, Leo Schott, whose term of office has
21 expired, and that said H. P. Boyden, auditor of said city of Cincinnati, E. O. Eshelby, treasurer of said city of Cincinnati, Eugene L. Lewis, auditor of Hamilton county, Ohio, and Tilden R. French, treasurer of Hamilton county, Ohio, are now necessary parties to this action.

That the defendants in the caption herein set out, at the January term, A. D. 1897, of the circuit court of Hamilton county, Ohio, recovered a judgment by consideration of said court against August J. Henkel, the plaintiff in error herein, in a certain action then pending, wherein said August J. Henkel was plaintiff and The City of Cincinnati, a municipal corporation, D. W. Brown, auditor of the city of Cincinnati, Henry M. Ziegler, treasurer of the city of Cincinnati, John Hagerty, auditor of Hamilton county, Ohio, and Leo Schott, treasurer of Hamilton county, Ohio, were defendants, the original pleadings between the parties and the papers on record in said cause, which was known in said circuit court as No. 2016, together with duly certified transcripts of the journal and docket entries in said court and in the court of common pleas below, which was numbered in said court as No. 98746, are filed herewith.

Said August J. Henkel, the plaintiff in error herein, avers that there is error in said records and proceedings, in this, to wit:

1. That said court erred in dismissing the petition of plaintiff and in dissolving the injunction granted by said court restraining the original defendants in said cause from collecting the assessment levied against the property of said plaintiff.

2. That said court erred in dismissing plaintiff's petition for the reason that the condemnation of plaintiff in error's property was had on the 11th day of April, 1890; that the same was ac-
22 cepted and paid for by said city, and that said city has failed to use such strip so condemned for a public highway, and that the same at this time remains unimproved as shown by the record.

Said August J. Henkel, plaintiff in error, therefore prays that said H. P. Boyden, auditor of the city of Cincinnati, E. O. Eshelby, treasurer of the city of Cincinnati, Eugene L. Lewis, auditor of Hamilton county, Ohio, and Tilden R. French, treasurer of Hamilton county, Ohio, be made parties defendant to this action; that they be notified of the pendency and prayer of this petition; that they be enjoined and restrained from collecting or attempting to collect said assessment, and that on a final hearing hereof, this plaintiff in error prays that said judgment may be reversed and that he may be restored to all things which he has lost by reason thereof.

LOUIS J. DOLLE,
DONALDSON & TUSSING,
Att'ys for Plaintiff in Error.

Petition in error verified.

Waiver of Summons in Error.

Filed September 28, 1897.

We hereby waive the issue and service of summons in error upon each of us in the above-entitled action, and voluntarily enter our appearance herein this 15th day of September, 1897.

ELLIS G. KINKEAD,
Corporation Counsel for the City of Cincinnati.
D. W. BROWN,
Auditor of the City of Cincinnati.
HENRY M. ZIEGLER,
Treasurer of the City of Cincinnati.

23 *Precipe.*

Filed September 28, 1897.

To the clerk of said court:

Issue summons in error to the sheriff of Hamilton county, returnable according to law, for the following defendants in error, to wit:

John Hagerty, auditor of Hamilton county, Ohio, Leo Schott, treasurer of Hamilton county, Ohio, H. P. Boyden, auditor of the city of Cincinnati, Ohio, E. O. Eshelby, treasurer of the city of Cincinnati, Ohio, Eugene L. Lewis, auditor of Hamilton county, Ohio, and Tilden R. French, treasurer of Hamilton county, Ohio.

LOUIS J. DOLLE AND
DONALDSON & TUSSING,
Att'ys for Pl't'ff in Error.

Summons in Error.

Filed October 6, 1897.

To the sheriff of the county of Hamilton:

You are hereby commanded to notify John Hagerty, auditor of Hamilton county, Ohio, Leo Schott, treasurer of Hamilton county, Ohio, H. P. Boyden, auditor of the city of Cincinnati, Ohio, E. O. Eshelby, treasurer of the city of Cincinnati, Ohio, Eugene L. Lewis, auditor of Hamilton county, Ohio, and Tilden R. French, treasurer of Hamilton county, Ohio, defendants in error, that August J. Henkel, plaintiff in error, has filed a petition in the clerk's office of the supreme court of the State of Ohio, asking a reversal of a judgment which defendants in error obtained against plaintiff in error at the January term, A. D. 1897, of the circuit court of Hamilton
24 county, and that unless said defendants in error attend forthwith before said supreme court, said judgment may be reversed.

You will make due return of this summons October 11th, A. D. 1897.

[SEAL.] Witness my hand and the seal of said supreme court this 28th day of September, A. D. 1897.

JOSIAH B. ALLEN,
Clerk of Supreme Court of Ohio,
By CHAS. C. PICKERING, *Deputy.*

1897, Oct. 5th.—Served the within-named John Hagerty, auditor of Hamilton Co., Ohio, Leo Schott, treasurer of Hamilton Co., Ohio, H. P. Boyden, auditor of the city of Cincinnati, Ohio, E. O. Eshelby, treasurer of the city of Cincinnati, Ohio, Eugene L. Lewis, auditor of Hamilton Co., Ohio, and Tilden R. French, treasurer of Hamilton county, Ohio, defendants in error, by delivering to each personally a true copy of this writ with all the endorsements thereon.

CHRIS. REICHEL,
Sheriff of Ham. Co., O.,
By ROB'T SWEENEY, *Deputy.*

25 THE STATE OF OHIO, } ss:
City of Columbus, }

I, Josiah B. Allen, clerk of the supreme court of Ohio, do hereby certify that the foregoing is a true copy of the printed record filed in cause No. 5712, August J. Henkel *vs.* The City of Cincinnati, a municipal corporation, *et al.*, in said court and used by said court in the consideration of said cause.

In witness whereof I have hereunto subscribed my name and affixed the seal of said supreme court this 27th day of January A. D. 1899.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk,*
By JOHN P. DANA, *Deputy.*

26 THE STATE OF OHIO, } ss:
City of Columbus, }

In the Supreme Court of Ohio, January Term, A. D. 1897.

Certified Transcript of Docket and Journal Entries.

In the record and proceedings then and there had and held among other things is the following, to wit:

AUGUST J. HENKEL, Plaintiff in Error,
vs.
THE CITY OF CINCINNATI, a Municipal Corporation; D. W. Brown, Auditor of the City of Cincinnati; Henry M. Ziegler, Treasurer of the City of Cincinnati; John Hagerty, Auditor of Hamilton County, Ohio, and Leo Schott, Treasurer of Hamilton County, Ohio, Defendants in Error.

5712. Error to the Circuit Court of Hamilton County.

Sept. 13, 1897. Petition in error, circuit court transcript filed.
" " " Original papers and bill of exceptions filed.
" 28, " Papers taken by L. B. Tussing.
" " " Waiver of summons of Ellis G. Kinkead, corporation counsel for The City of Cincinnati; D. W. Brown, auditor of the city of Cincinnati, and Henry M. Ziegler, treasurer of the city of Cincinnati, filed.
" " " Precipe filed.
" " " Summons issued, directed to the sheriff of Hamilton county, for defendants in error, John Hagerty, auditor of Hamilton county, Ohio; Leo Schott, treasurer of Hamilton county, Ohio; H. P. Boyden, auditor of the city of Cincinnati, Ohio; E. O. Eshelby, treasurer of the city of Cincinnati, Ohio; Eugene L. Lewis, auditor of Hamilton county, Ohio, and Tilden R. French, treasurer of Hamilton county, Ohio, returnable October 11th, A. D. 1897.

Oct. 6, " Summons returned and filed, endorsed: "1897, Oct. 5th, served the within-named John Hagerty, auditor of Hamilton county, Ohio; Leo Schott, treasurer of Hamilton Co., Ohio; H. P. Boynton, auditor of the city of Cincinnati, Ohio; E. O. Eshelby, treasurer of the city of Cincinnati, Ohio; Eugene L. Lewis, auditor of Hamilton Co., Ohio, and Tilden R. French, treasurer of Hamilton county, Ohio, defendants in error, by delivering to each personally a true copy of this writ with all the endorsements thereon. Chas. Reichel, sheriff of Ham. Co., O., by Robert Sweeney, deputy. (Fees, $5.44.)"

Oct. 21, 1897. 27 Precipe & summons taken by Donaldson & T.
" 28, " " " " & papers returned.
" " " Printed record filed.
Dec. 10, " Proof of service printed record filed.
Jan'y 22, 1898. Motion by defendants to advance, & notice filed.
" 25, " Motion by plaintiff for temporary restraining order, and notice filed.
" " " Printers' receipted bill for printing record filed.
Feb'y 1, " Journal entry: "Motion by defendants to advance cause # 5712 on the general docket. Ordered by the court that said motion be, and the same is hereby, allowed; cause advanced and briefs to be filed within rule." Order Book No. 15, page 507.
" " " Journal entry: "Motion by plaintiff for temporary restraining order in cause No. 5712 on the general docket. Ordered by the court that said motion be, and the same is hereby, allowed and the restraining order granted as prayed for, upon the plaintiff in error entering into an undertaking in the sum of one hundred dollars ($100.00), conditioned according to law, with sureties to be approved by the clerk of the circuit court of Hamilton county, said temporary restraining order to be in full force and effect during the pendency of this proceeding in error or until the further order of this court." Order Book No. 15, page 507.
Apr. 1, " Plaintiff's printed brief and proof of service filed.
" 29, " Defendants' printed brief and proof of service filed.
June 14, " Journal entry: "This cause came on to be heard upon the transcript of the record of the circuit court of Hamilton county and was argued by counsel. On consideration whereof it is ordered and adjudged by this court that the judgment of the said circuit court be, and the same is hereby, affirmed; and, it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendants in error recover from the plaintiff in error their costs herein expended, taxed at $—. Ordered that a special mandate be sent the circuit court of Hamilton county to carry this judgment into execution." Order Book No. 16, page 150.
" 21, " Mandate issued.
" " " Original papers sent to clerk.
Jan'y 6, 1899. Journal entry: "Be it remembered that on this 6th day of January, 1899, on the application of August J. Henkel, plaintiff in error herein, to the Honorable William T. Spear, chief justice of the supreme court of Ohio, said chief justice then and there made and signed the following certificate in

said case in the words and figures following, to wit: I, the undersigned, chief justice of the supreme court of the State of Ohio, on application of August J. Henkel, plaintiff in error herein, do hereby certify that the following question of law
28 was made by said plaintiff in error herein and was submitted to this court according to law for decision by this court on the final hearing of the above-entitled case on the 14th day of June, 1898, to wit: Whether or not the assessment made and imposed upon the property of the plaintiff in error herein by the defendant in error The City of Cincinnati was in violation of the fourteenth amendment to the Constitution of the United States; and I hereby certify that it was thereupon decided by this court upon said final hearing, against the claim and contention of the plaintiff in error, that said assessment was not in violation of said fourteenth amendment to the Constitution of the United States. I hereby further certify that the said supreme court of Ohio is the highest court in said State in which said case can be reviewed. William T. Spear, chief justice of the supreme court of Ohio. On motion of said plaintiff in error, it is ordered that the foregoing certificate be made a part of the record in this case." Order Book No. 16, page 259.

THE STATE OF OHIO, *City of Columbus,* } *ss:*

I, Josiah B. Allen, clerk of the supreme court of Ohio, do hereby certify that the foregoing are all the entries in cause No. 5712, August J. Henkel *vs.* The City of Cincinnati, a municipal corporation, *et al.*, and that the same are truly taken and correctly copied from the records of said court, to wit, from Order Book No. 15, page 507, and Order Book No. 16, pages 150 & 259, and Minute Book No. 18, pages 726 & 738.

In witness whereof I have hereunto subscribed my name and affixed the seal of said supreme court this 27th day of January, A. D. 1899.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk,*
By JOHN P. DANA, *Deputy.*

29 Supreme Court of the United States.

AUGUST J. HENKEL, Plaintiff in Error,
vs.
THE CITY OF CINCINNATI, a Municipal Corporation, ET AL., Defendants in Error.

Assignment of Errors and Prayer for Reversal.

Now comes the said August J. Henkel, plaintiff in error, and for an assignment of errors herein says:

That on and prior to February 2d, 1890, he was the owner of a strip of land, being two hundred and twenty-eight and seventy-two-hundredths (228.72) feet on the north side of Molitor street by one hundred (100) feet in depth, lying immediately next and contiguous to Burnet Woods park, all in the city of Cincinnati, Ohio.

Hopson street lies along the east line of Burnet Woods park, is thirty (30) feet in width, and extends south from Rochelle street to the said property of this plaintiff in error.

On the 3d day of February, 1890, the said city of Cincinnati, in pursuance of an ordinance theretofore duly passed by said city, brought proper proceedings in the probate court of Hamilton county, Ohio, to condemn and appropriate to public use for street purposes, and for the purpose of opening said Hopson street from Molitor street to Wayne street, a strip of land thirty (30) feet wide off of the west portion of the lands so owned by plaintiff in error
30 herein, and lying immediately next to said Burnet Woods park, property then owned by the said city of Cincinnati. The jury in said proceedings in said probate court assessed compensation in favor of the plaintiff in error for said strip of land so appropriated, as aforesaid, in the sum of twelve hundred (1,200) dollars, which sum was paid to the plaintiff in error by said city. The costs of said proceedings amounted to the sum of two hundred and fifty-seven and eighty-hundreds (257.80) dollars.

On September 21st, 1892, said city of Cincinnati found that the total cost of the land appropriated amounted to the sum of one thousand four hundred and fifty-seven and eighty-hundredths (1,457.80) dollars, two per cent. of which amount was recognized by said city as its portion of the expense, and one-half of the balance, namely, seven hundred and fourteen and thirty-three-hundredths (714.33) dollars, was assessed by said city on said date upon the remaining property of the plaintiff in error in ten annual installments, bearing five per cent. interest, and the other half charged against the lands of the said city of Cincinnati, to wit, said Burnet Woods park, abutting upon said strip so appropriated, as aforesaid. The remaining property of the plaintiff in error from which said strip so appropriated was taken was the only private frontage assessed.

For convenient reference, a plat of the property on Hopson street is attached hereto, marked "A."

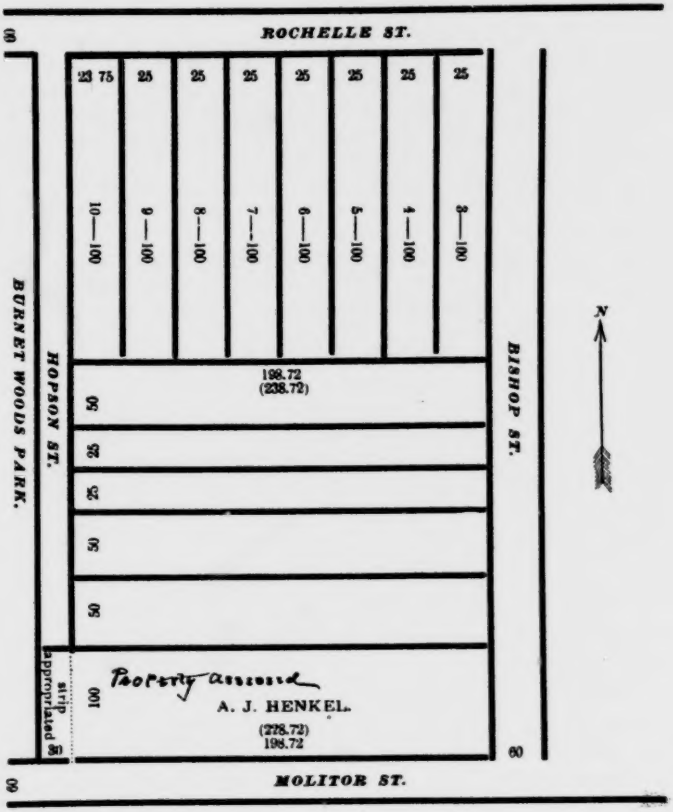
Plaintiff in error further says that section 5848, Revised Statutes of Ohio, confers jurisdiction upon the courts of common pleas of the State of Ohio to enjoin the illegal levy of taxes and assess-
31 ments or the collection of either, and that plaintiff in error, having no other remedy against said assessment upon his said property, appealed to his rights under said section, and on the 17th day of January, 1894, filed his petition in the court of common pleas of said Hamilton county, Ohio, praying that the said city of Cincinnati be enjoined and restrained from collecting said assessment against his said property, and that D. W. Brown, auditor of said city, be enjoined and restrained from certifying said assessment to the auditor of said Hamilton county for collection; that the auditor of Hamilton county be enjoined and restrained from certifying the amount certified to him by the auditor of said city to the treasurer of said Hamilton county; that the treasurer of said Hamilton county be enjoined and restrained from the collection of the amount certified to him by the auditor of said Hamilton county, and that all of said defendants be enjoined and restrained from demanding or receiving and collecting from plaintiff in error said assessment as it became due. Thereupon said court granted and issued a restraining order as prayed for.

Plaintiff in error further says that on the 13th day of November, 1894, in said cause then so pending in said common pleas court of Hamilton county, in which he was plaintiff and the said City of Cincinnati, a municipal corporation; D. W. Brown, auditor of the city of Cincinnati; Henry M. Ziegler, treasurer of the city of Cincinnati; John Hagerty, auditor of Hamilton county, Ohio, and Leo Schott, treasurer of Hamilton county, Ohio, were defendants, a judgment, decree, and order were entered in favor of said defendants and against him, the said August J. Henkel,
32 dissolving said injunction and dismissing said petition at his costs and in effect holding said assessment valid and legal against his said property.

Thereupon the said August J. Henkel duly and legally appealed said case to the circuit court in and for said Hamilton county, Ohio; and afterwards, on the 14th day of June, 1897, said circuit court, in said cause then pending therein, in which the said August J. Henkel was plaintiff and the said City of Cincinnati, a municipal corporation, *et al.*, were defendants, rendered a judgment, decree, and order in favor of said defendants and against him, the said August J. Henkel, dismissing said petition and dissolving said injunction at his costs, and in effect holding said assessment valid and legal against his said property.

Plaintiff in error further represents that at the January term, 1898 (June 14th, 1898), of the supreme court of the State of Ohio, which is the highest court of law or equity in said State in which a decision of said case can be had, said judgment, decree, and order of said circuit court and said common pleas court of said Hamilton county were by said supreme court of Ohio affirmed; all of which will more fully appear by an authenticated transcript of the record in said case herewith filed.

"A."



Monod
Henkel
v.
Cincinnati
} p. 34.

Plaintiff in error further says that in the rendering said judgment, decree, and order error intervened to his prejudice, as will appear by said record, and that among the errors so intervening are the following:

1. The said assessment against plaintiff's said remaining property from which said strip of land was appropriated, as aforesaid,
33 by said city of Cincinnati for the opening and extention of said Hopson street, as aforesaid, and the said ordinance so passed and enacted by said city of Cincinnati on said 21st day of September, 1892, authorizing and levying said assessment on plaintiff in error's said premises, as aforesaid, are in conflict with, in violation of, and repugnant to section one (1) of the fourteenth amendment to the Constitution of the United States, which provides: "nor shall any State deprive any person of life, liberty, or property without due process of law."

Other errors apparent upon the record.

3. Further errors.

Wherefore the said August J. Henkel, plaintiff in error, prays that said judgment may be reversed, and that he may be restored to all things which he has lost by reason thereof.

AUGUST J. HENKEL,
By DONALDSON & TUSSING AND
LOUIS J. DOLLE, *His Attorneys.*

(Here follows diagram marked p. 34.)

35 [Endorsed:] Supreme Court of the United States. August J. Henkel, plaintiff in error, *vs.* The City of Cincinnati, a municipal corporation, *et al.*, defendants in error. Assignment of errors and prayer for reversal. Donaldson & Tussing and Louis J. Dolle, att'ys for plaintiff in error.

36 AUGUST J. HENKEL, Plaintiff in Error,
vs.
THE CITY OF CINCINNATI, a Municipal Corporation; D. W. Brown, Auditor of the City of Cincinnati; Henry M. Ziegler, Treasurer of the City of Cincinnati; John Hagerty, Auditor of Hamilton County, Ohio; Leo Schott, Treasurer of Hamilton County, Ohio, Defendants in Error. } No. 5712.

To the Honorable William T. Spear, chief justice of the supreme court of the State of Ohio:

Your petitioner, August J. Henkel, a citizen of the United States and of the State of Ohio, residing in said State, to your honor respectfully represents and sets forth that at the January term, A. D. 1897, of the circuit court of Hamilton county, in the State of Ohio, in a case wherein one August J. Henkel was plaintiff and the said The City of Cincinnati, a municipal corporation; D. W. Brown, auditor of the city of Cincinnati; Henry M. Ziegler, treasurer of the city of Cincinnati; John Hagerty, auditor of Hamilton county,

Ohio; Leo Schott, treasurer of Hamilton county, Ohio, were defendants, a decree and order was rendered by said circuit court in favor of said defendants and against your petitioner.

And that your petitioner caused a petition in error to be presented to the supreme court of Ohio to reverse said decree and order, but the same were at the January term, A. D. 1898, affirmed by said supreme court.

37 Your petitioner further represents and states that in said case he sought relief from an assessment upon his property, which he claimed was unjust and illegal, as set forth in his petition therein, and that said order and decree were in favor of the validity of said assessment.

Your petitioner further represents that he claimed and contended and specially set up in said case that said assessment so imposed upon his said property, as set forth by your petitioner in said case, was and is in conflict with, repugnant to, and in violation of the fourteenth amendment to the Constitution of the United States, and the said supreme court of Ohio (being the highest court of law or equity in said State in which a decision can be had in said cause) decided and held that said assessment was not in violation of said fourteenth amendment to the Constitution of the United States, and the said judgment in its practical operation being a taking of private property for public uses without compensation and in effect confiscation of the property of your petitioner; all of which appears plainly upon the face of the record in said case, a certified transcript of which is presented herewith.

Your petitioner therefore asks leave to have his writ of error in this behalf, to the end that it may be determined by the judgment of the Supreme Court of the United States whether said assessment is not in violation of the provisions of the Constitution of the United States; and he prays further for a supersedeas, and that the amount of the bond therefor may be fixed by your honor.

AUGUST J. HENKEL,
By DONALDSON & TUSSING AND
LOUIS J. DOLLE, *His Attorneys.*

38 Writ of error and supersedeas allowed, as prayed for in the foregoing petition, the plaintiff in error to execute to the defendants in error an undertaking in the sum of $1,800.00, conditioned according to law, with sufficient surety, to be approved as the statute directs.

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court of Ohio.

[Endorsed:] August J. Henkel, plaintiff in error, *vs.* The City of Cincinnati, a municipal corporatian, *et al.*, defendants in error. Application for a writ of error to the Supreme Court of the U. S. Filed Jan. 27, 1899, in supreme court of Ohio. J. B. Allen, clerk.

39 AUGUST J. HENKEL, Plaintiff in Error,
vs.
THE CITY OF CINCINNATI, a Municipal Corporation; D. W. Brown, Auditor of the City of Cincinnati; Henry M. Ziegler, Treasurer of the City of Cincinnati; John Hagerty, Auditor of Hamilton County, Ohio; Leo Schott, Treasurer of Hamilton County, Ohio, Defendants in Error. } No. 5712.

THE UNITED STATES OF AMERICA, *ss*:

To the honorable judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a case which is in the said supreme court of Ohio, before you or some of you, being the highest court of law or equity in the said State in which a decision could be had in the said case between August J. Henkel, plaintiff in error, and The City of Cincinnati, a municipal corporation; D. W. Brown, auditor of the city of Cincinnati; Henry M. Ziegler, treasurer of the city of Cincinnati; John Hagerty, auditor of Hamilton county, Ohio; Leo Schott, treasurer of Hamilton county, Ohio, defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under any State, on
40 the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, this 13th day of January, A. D. 1899.

[Seal of the Circuit Court, Southern Dist. of Ohio.]

B. R. COWEN,
Clerk of U. S. Circuit Ct., Southern District of Ohio, Eastern Division,
By C. P. WHITE, *Deputy.*

[Endorsed:] United States of America. August J. Henkel, plaintiff in error, *vs.* The City of Cincinnati, a municipal corporation, *et al.*, defendants in error. A writ of error from the Supreme Court of the United States to the supreme court of Ohio. Filed Jan. 27, 1899, in supreme court of Ohio. J. B. Allen, clerk.

41 AUGUST J. HENKEL, Plaintiff in Error,
vs.
THE CITY OF CINCINNATI, a Municipal Corporation, *et al.*, Defendants in Error.

The United States of America to the City of Cincinnati, Ohio, a municipal corporation; D. W. Brown, auditor of the city of Cincinnati; Henry M. Ziegler, treasurer of the city of Cincinnati; John Hagerty, auditor of Hamilton county, Ohio; Leo Schott, treasurer of Hamilton county, Ohio; H. P. Boyden, auditor of the city of Cincinnati, Ohio; E. O. Eshelby, treasurer of the city of Cincinnati, Ohio; Eugene L. Lewis, auditor of Hamilton county, Ohio, and Tilden R. French, treasurer of Hamilton county, Ohio, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio, wherein August J. Henkel is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William T. Spear, chief justice of the supreme court of the State of Ohio, this 13th day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

WILLIAM T. SPEAR,
Chief Justice, Supreme Court of Ohio.

42 [Endorsed:] August J. Henkel, plaintiff in error, *vs.* The City of Cincinnati, a municipal corporation, *et al.*, defendants in error. United States of America. Citation.

Service of the within notice is hereby acknowledged on behalf of John Hagerty, auditor of Hamilton county, Ohio; Leo Schott, treasurer of Hamilton county, Ohio; Tilden R. French, treasurer of

Hamilton county, Ohio, and Eugene L. Lewis, auditor of Hamilton county Ohio, all by Rendigs, Foraker & Dinsmore, Co. solicitors of Hamilton Co., Ohio, and attorneys for said officers, this 20th day of February, A. D. 1899.

RENDIGS, FORAKER & DINSMORE,
County Solicitors and Att'ys for said Def'ts.

Service of the within notice is hereby acknowledged on behalf of the city of Cincinnati, D. W. Brown, city auditor; Henry M. Ziegler, its treasurer; H. P. Boyden, city auditor, & E. O. Eshelby, city treasurer, this 21st day of January, A. D. 1899.

ELLIS G. KINKEAD,
Corporation Counsel of the City of Cincinnati and Attorney for said Defendants.

43 [Endorsed:] August J. Henkel, plaintiff in error, *vs.* The City of Cincinnati, a municipal corporation, *et al.*, defendants in error. United States of America. Citation. Filed Jan. 27, 1899, in supreme court of Ohio. J. B. Allen, clerk. Donaldson & Tussing and Louis J. Dolle, attorneys.

44 AUGUST J. HENKEL, Plaintiff in Error,
vs.
THE CITY OF CINCINNATI, a Municipal Corporation; D. W. BROWN, Auditor of the City of Cincinnati; Henry M. Ziegler, Treasurer of the City of Cincinnati; John Hagerty, Auditor of Hamilton, County, Ohio; Leo Schott, Treasurer of Hamilton County, Ohio, Defendants in Error.

Know all men by these presents that we, August J. Henkel and Frank H. Kirchner and Conrad E. Henkel, are held and firmly bound unto the city of Cincinnati, a municipal corporation, in the full and just sum of eighteen hundred dollars, to be paid to the said The City of Cincinnati, Ohio, or its assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of January, A. D. 1899.

Whereas lately, at the supreme court of the State of Ohio, in a case pending in said court between August J. Henkel, plaintiff in error, and The City of Cincinnati, a municipal corporation; D. W. Brown, auditor of the city of Cincinnati; Henry M. Ziegler, treasurer of the city of Cincinnati; John Hagerty, auditor of Hamilton county, Ohio; Leo Schott, treasurer of Hamilton county, Ohio, defendants in error, a judgment was rendered against the said August J. Henkel, and the said August J. Henkel having obtained a

45 writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid case, and a citation directed to said The City of Cincinnati, Ohio, and said other defendants according to law, citing and admonishing said defendant corporation and said other defendants to be and appear

at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said August J. Henkel shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

AUG. J. HENKEL.
CONRAD E. HENKEL.
FRANK H. KIRCHNER.

Sealed and delivered in presence of—
CHARLES F. DOLLE.

Approved by—
WILLIAM T. SPEAR,
Chief Justice, Supreme Court of Ohio.

STATE OF OHIO, }
Hamilton County, } *ss:*

I, Frank H. Kirchner, being first duly sworn, say that I am a freeholder of the county of Hamilton and reside at Whitfield Ave., in the city of Cincinnati, Ohio; that I am worth the sum of three thousand dollars over and above all my debts and liabilities, including my liabilities as bail, surety, or otherwise, and over and above all my property which is exempt by law from execution.

FRANK H. KIRCHNER.

Sworn to before me and subscribed in my presence this 10th day of January, A. D. 1899.

[Notarial Seal, Hamilton County, O.]

CHARLES F. DOLLE,
Notary Public, Hamilton County, O.

STATE OF OHIO, }
Hamilton County, } *ss:*

I, Conrad E. Henkel, being first duly sworn, say that I am a freeholder of the county of Hamilton and reside at Daniels street, in the city of Cincinnati, Ohio; that I am worth the sum of three thousand dollars over and above all my debts and liabilities, including my liabilities as bail, surety, or otherwise, and over and above all my property which is exempt by law from execution.

CONRAD E. HENKEL.

Sworn to before me and subscribed in my presence this 10th day of January, A. D. 1899.

[Notarial Seal, Hamilton County, O.]

CHARLES F. DOLLE,
Notary Public, Hamilton County, O.

46 [Endorsed:] August J. Henkel, plaintiff in error, *vs.* The City of Cincinnati, a municipal corporation, *et al.*, defendants in error. Supersedeas bond in duplicate. Filed Jan. 27, 1899, in supreme court of Ohio. J. B. Allen, clerk.

[Endorsed:] In the Supreme Court of the United States. August J. Henkel, plaintiff in error, *vs.* The City of Cincinnati, a municipal corporation, *et al.*, defendants in error. Donaldson & Tussing and Louis J. Dolle, att'ys for pl't'ff in error.

Endorsed on cover: File No., 17,292. Ohio supreme court. Term No., 206. August J. Henkel, plaintiff in error, *vs.* The City of Cincinnati *et al.* Filed February 10th, 1899.

(17,292.)

United States Supreme Court.

No. 206.

AUGUST J. HENKLE,

Plaintiff in Error,

v.

THE CITY OF CINCINNATI, A Municipal Corporation, et al.,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

DONALDSON & TUSSING, and
DOLLE & DOLLE,
Attorneys for Plaintiff in Error.

COLUMBUS, OHIO:
THE WEEKLY LAW BULLETIN, PRINTERS.
1899.

(17,292.)

(17,292.)

In the Supreme Court of the United States.

No. 206.

AUGUST J. HENKEL,

Plaintiff in Error,

v.

THE CITY OF CINCINNATI, a municipal corporation, et al.,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On December 31st, 1889, August J. Henkel, the plaintiff in error, was the owner in fee simple of a lot of land in the city of Cincinnati, Ohio, commencing at a point in the northwest corner of Molitor and Bishop streets, and thence running west along the north line of Molitor street two hundred and twenty-eight and seventy-two hundredths (228.72) feet to the west line of Corry's tract, which west line is the east line of Burnet Woods park, and thence north and with the east line of Burnet Woods park one hundred (100) feet, thence east and parallel with Molitor street two hundred and twenty-eight and seventy-two hundredths (22 8.72) feet, thence south on a line parallel with the east line of Burnet Woods park one hundred (100) feet to the place of beginning, so that plaintiff in error's west line was the east line of said Burnet Woods park.

Hopson street lies along the east line of said Burnet Woods park, is thirty (30) feet in width, and on said 31st day of December, 1889, extended south from Rochelle street, formerly known as Wayne street, to the said lands of plaintiff in error.

The city of Cincinnati, by its council and board of administration, on the 31st day of December, 1889, passed an ordinance declaring its intention to condemn and appropriate to public use for street purposes and for the purpose of opening Hopson street to Molitor street, a strip of ground thirty (30)

feet wide off of the west end of plaintiff in error's said lands; and this case arises out of the condemnation of said strip of ground as aforesaid.

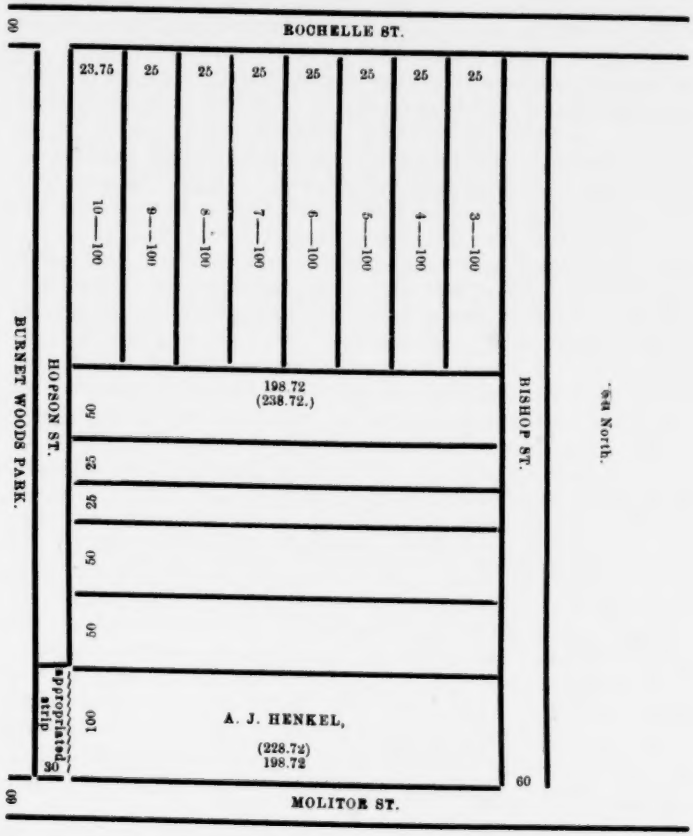
By said ordinance, (see exhibit "A", page 8, of the record) the said city authorized the necessary proceedings to be had for an inquiry and assessment of the compensation to be paid for said strip of ground, and declared that the compensation so found, together with all costs and expenses of said appropriation and the interest on bonds issued, should be assessed per front foot upon the lots and lands bounding and abutting upon said strip of ground so to be condemned as aforesaid, the said lots and lands being declared by said ordinance to be the lots and lands which would be specially benefited by said appropriation, according to the laws and ordinances on the subject of assessments; the assessments therefor to be payable in ten annual installments, the same to be collected as provided by law and the assessing ordinance thereafter to be passed. And that bonds should be issued in anticipation of such assessment.

On the 3d day of February, 1890, the said city commenced proceedings in the probate court of Hamilton county, Ohio, against plaintiff in error, under the statute, to assess compensation for said strip of ground and in which proceedings on April 11th, 1890, the same was condemned for street purposes as aforesaid and compensation therefor was assessed by the jury at forty (40) dollars per front foot, making the sum of twelve hundred dollars ($1,200.00); which assessment of compensation was made "irrespective of any benefit to the plaintiff in error from any improvement proposed by said corporation." On January 21st, 1891, the amount of said verdict was paid to plaintiff in error and possession of said premises given. The costs of said proceedings amounted to two hundred and fifty-seven and eighty hundredths ($257.80) dollars.

On September 21st, 1892, said city found that the total costs of said strip of ground so appropriated aggregated one thousand, four hundred and fifty-seven and eighty hundredths dollars ($1,457.80), and by its board of administration passed an assessing ordinance (see exhibit "B", page 9, of the Record), whereby it was ordained that two per cent of said amount should be and was recognized as the said city's portion of said total costs, and one-half of the balance, namely seven hundred and fourteen and thirty-three hundredths ($714.33) dollars was levied and assessed by the front foot upon the remainder of plaintiff in error's said lands bounding and abutting on Hopson street, in ten annual installments, bearing five per cent. interest, payable annually, and the other half charged against the lands of said city, namely, Burnet Woods park, abutting

upon said strip of ground so appropriated as aforesaid. And that plaintiff in error should pay the said amount of money by him due, in that behalf, to the city auditor, on or before the 20th day following the day of the final approval of said ordinance, in each of the several years, and in default of such payment, the city auditor should forthwith certify all unpaid assessments to the county auditor, to be by him placed upon the tax duplicate and collected according to law. Thus the property of the plaintiff in error from which said strip of ground appropriated was taken, is the only private frontage sought to be assessed, the said Burnet Woods park being the property of the said city of Cincinnati.

For convenient reference, a plat of the property on Hopson street and including the property of plaintiff in error, is shown as follows:



This action was brought by plaintiff in error originally in the common pleas court of Hamilton county, Ohio, to obtain a decree restraining the defendant in error, the city of Cincinnati, Ohio, a municipal corporation, from enforcing the assessment ordained by said assessment ordinance, against the remainder of his lands not taken in said appropriation bounding and abutting on said strip so taken.

Plaintiff in error claimed and relied upon the invalidity of said assessment ordinance, whereby said city charged and imposed upon the remainder of his said lands abutting upon the portion so appropriated one-half of the entire amount allowed him by the jury for his lands taken and one-half of the entire costs and expenses incurred by said city in obtaining title to said lands appropriated, on the ground that said assessment ordinance and said assessment and charge upon the remainder of his said lands are in conflict with, repugnant to and in violation of, section one (1), of the fourteenth amendment to the constitution of the United States, which provides: That no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws.

A temporary restraining order was allowed as prayed for by said common pleas court, and on final hearing, the same was dissolved and the petition dismissed. Appeal was taken to the circuit court of said Hamilton county, Ohio, where a like decree was rendered, dissolving said injunction and dismissing the petition. Error was thereupon prosecuted from said circuit court to the supreme court of Ohio, where the judgment of said circuit court was affirmed. Whereupon plaintiff in error removed said case from said supreme court of Ohio, the same being the highest court of law or equity in said state in which a decision could be had in said case, to the supreme court of the United States, under the twenty-fifth section of the judiciary act of 1789, which provides that a final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege,

or immunity specially set up or claimed, by either party, under such constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the supreme court of the United States upon a writ of error.

SPECIFICATION OF ERRORS.

In the supreme court of Ohio on the final hearing of this case, the plaintiff in error specially set up and claimed that the said assessment upon remainder of his said property bounding and abutting upon the said strip of ground appropriated, as ordained by said assessment ordinance, was made without regard to the benefits which it conferred upon the property of plaintiff in error, (see subdivision 5, of page 3, of the Record) and that said assessment ordinance and said assessment were in violation of the fourteenth amendment to the constitution of the United States, that no state shall deprive any person of his property without due process of law; and that said supreme court of Ohio, on said final hearing against the said claim and contention of plaintiff in error, declared that said assessment ordinance and said assessment were not in violation of said fourteenth amendment to the constitution of the United States. (See journal entry of January 6th, 1899, in said court, on pages 17 and 18 of the Record.)

Said supreme court of Ohio erred in so holding and deciding that said assessment ordinance and said assessment were not in violation of said fourteenth amendment, against the said claim and contention of the plaintiff in error, and in affirming the judgment of the circuit court of Hamilton county, Ohio.

ARGUMENT.

It is well settled that the due process of law prescribed by the fourteenth amendment of the constitution of the United States requires compensation to be made or secured to the owner of private property when the same is taken by a state, or by the authority of a state, for public use.

Chicago, B. & Q. R. Co. v. City of Chicago, 166 U. S., 226, 241; 17 Sup. Ct., 581.

Long Island Water Supply Co. v. City of Brooklin, 166 U. S., 685, 695; 17 Sup. Ct., 718.

Said assessment ordinance and said assessment are based upon section 2271, of the Revised Statutes of Ohio, which is as follows: "In cities of the first grade of the first class, and

in corporations in counties containing a city of the first grade of the first class, the tax or assessment especially levied or assessed upon any lot or land for any improvement, shall not except as provided in section 2272, exceed twenty-five per centum of the value of such lot or land after the improvement is made, and the costs exceeding that per centum shall be paid by the corporation out of its general revenue; * * * and whenever any street or avenue is opened, extended, straightened, or widened, the special assessment for the cost and expense, or any part thereof, shall be assessed only on the lots and lands bounding and abutting on such part or parts of said street or avenue so improved, and shall include of such lots and lands only to a fair average depth of lots in the neighborhood, but shall also include other lots and parts thereof and lands to such depth; and whenever at least one-half in width of any street or avenue has been dedicated for such purpose from the lots and lands lying on one side of the line of such street or avenue, and such street or avenue is widened by taking from lots and lands on the other side thereof, no part of the cost and expense thus increased (incurred) shall be assessed upon the lots and lands lying on said first-mentioned side, but only upon the other side, and as aforesaid, but said special assessment shall not be in any case in excess of benefits."

This statute and said assessment ordinance founded upon it authorized a special assessment upon the property bounding and abutting upon the strip appropriated by the front foot for the entire cost and expense of the appropriation and improvement without taking special benefits into account. The city of Cincinnati by its council declared by its ordinance of December 31st, 1889, that the lots and lands bounding and abutting upon the strip of ground to be appropriated were the lands which would be specially benefited by said appropriation and should therefore be assessed with the entire cost thereof, and it is plain and manifest that the said city proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not to the extent of such cost.

Village of Norwood v. Baker, decided by the Supreme Court, of the United States, December 12th, 1898.

In the Norwood case, Baker owned on both sides of the proposed street to be opened, and the entire amount allowed by the jury and the entire cost and expense of the appropriation were assessed back upon the remainder of Baker's property by the front foot, that is, one-half of said entire cost and expense of the appropriation upon each side of the proposed

street. In this case, Henkel owned upon but one side of the proposed street to be opened, and the city of Cincinnati assessed back upon his said property by the front foot one-half of the entire cost and expense of the appropriation. The jury allowed him twelve hundred dollars compensation for his property taken. The city of Cincinnati assessed back upon his said frontage $714.33, so that he actually received for his property taken, $485.67. His property from which the appropriation was taken, had a frontage of 228.72 feet on Molitor street, and after the appropriation 198.72 feet, with 100 feet depth, also a frontage upon Bishop street. The very position of the lots north of plaintiff in error's property fronting upon Hopson street, shows them to be far more benefited by the opening of Hopson street than plaintiff in error's property, yet plaintiff in error's property is the only private frontage assessed, and as in the Norwood-Baker case, is made to bear one-half of the entire burden of the appropriation. The assessment of the other half upon Burnet Woods park was virtually an assessment or tax upon the entire city of Cincinnati, as said park was the property of said city. If Henkel had owned upon both sides of the strip appropriated as in the Norwood-Baker case, under the system of assessment here adopted, the entire cost and expense of the appropriation would have fallen upon his property. This assessment and the principles involved in it are therefore exactly the same as in the Norwood-Baker case.

The plaintiff in error claims that the burden imposed upon the remainder of his property by the defendant in error, the city of Cincinnati, is unjust, illegal, and wholly void under the principles of law laid down in the Norwood-Baker case as follows:

"The only just basis upon which special assessments for public improvements can rest, is that of special benefits to the property taxed; and the exaction from the owner of private property of the cost of such an improvement, in substantial excess of the special benefits accruing to him, is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.

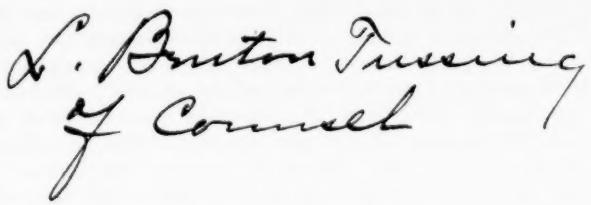
"Where a special assessment is in itself illegal, because it rests upon a basis that excludes any consideration of benefits to the property taxed, proof that it is in excess of benefits is not required, in a suit to enjoin its enforcement, as the only appropriate decree in such case is one enjoining the whole assessment, leaving the local authorities to make a new one according to law.

"Nor is such suit controlled by the general principle that

a plaintiff must tender or offer to pay what its legally due, before he can obtain relief in equity against an excessive tax, the entire assessment being illegal.

"Proceedings under a state statute, by which ground for a street was condemned through plaintff's property, the damages awarded were paid, and the amount of such damages, together with all the costs and expenses of the condemnation, were assessed back on the remaining property of plaintiff, lying on either side of the street, without inquiry as to sepecial benefits, constituted a taking of plaintiff's property for public use without compensation, to the extent of the excess of the cost of opening the street over the benefits."

DONALDSON & TUSSING, and
DOLLE & DOLLE,
Attorneys for Plaintiff in Error.



FILED
MAR 8 1900
JAMES H. McKENNEY,

No. 206.

Brf. of Kinkead & Ellis for D.C.

(17,392.)

Filed Mar. 8, 1900.

In the Supreme Court of the United States.

No. 206.

August J. Henkel,
Plaintiff in Error.

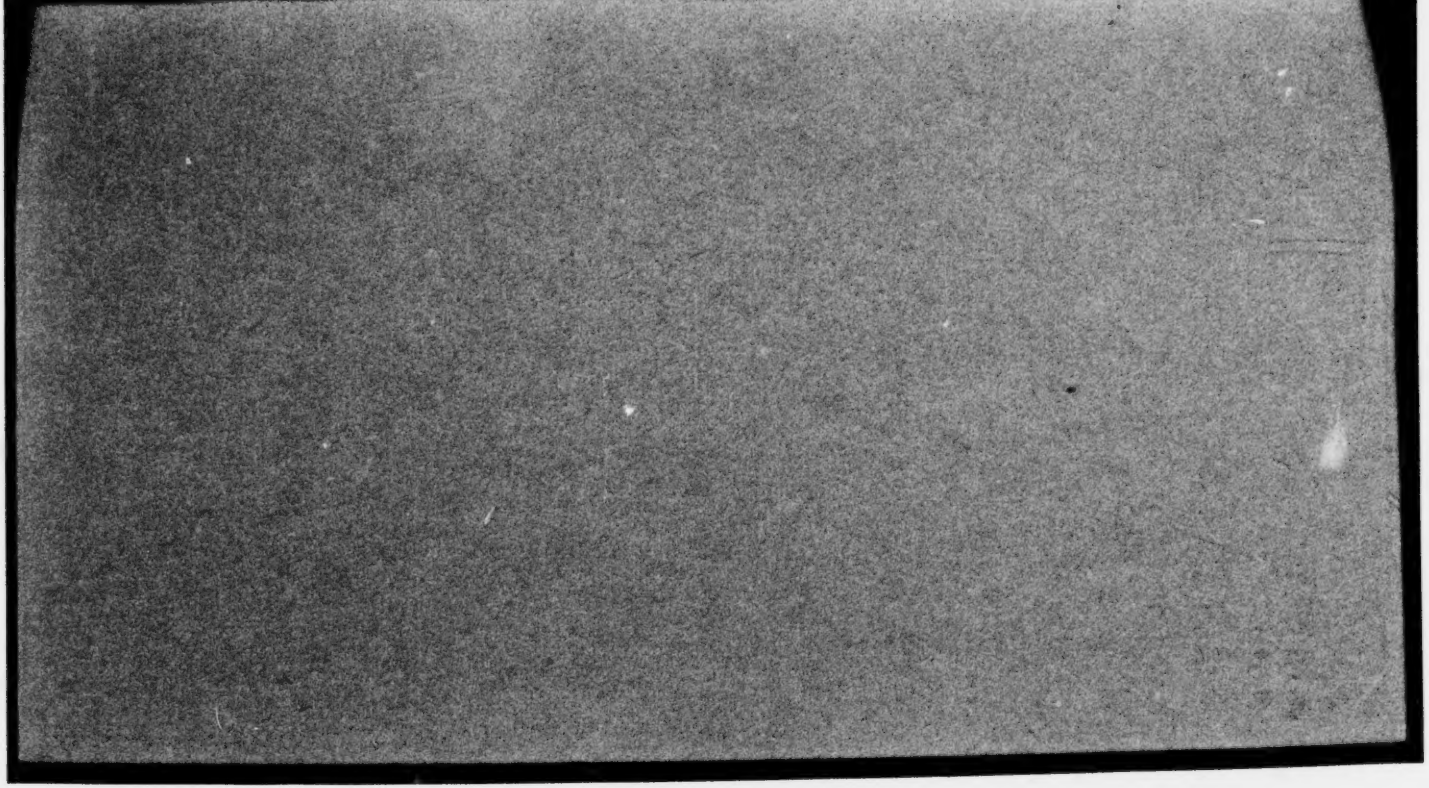
vs.

The City of Cincinnati, a Municipal Corporation, et al.,
Defendants in Error.

BRIEF FOR THE CITY OF CINCINNATI.

ELLIS G. KINKEAD,
WADE H. ELLIS,
Corporation Counsel
for the City of Cincinnati.

(17,392.)



(17,292.)

In the Supreme Court of the United States

August J. Henkel,

Plaintiff in Error,

No. 206.] *vs.*

The City of Cincinnati, a Municipal Corporation, et al.,

Defendants in Error.

BRIEF FOR THE CITY OF CINCINNATI.

DISTINCTIONS BETWEEN THE CASE AT BAR AND THAT OF NORWOOD vs. BAKER.

This case was decided in the Supreme Court of Ohio in June, 1898 (Record, p. 17), that court affirming the decisions rendered in both the lower courts of the State of Ohio. The case of *Norwood* v. *Baker*, 172 U. S. 269, was decided in this court December 12, 1898, and thereupon the plaintiff in error, considering that the issue in the case at bar was similar to that presented in the case of *Norwood* v. *Baker*, caused to be made on the journal of the Supreme Court of Ohio, on January 6, 1899, more than six months after the decision of the case, an entry (Record, p. 17) reciting that a federal question was submitted to that court for decision, and thereupon prosecuted his writ of error to this court.

The plaintiff in error relies entirely for a reversal of the judgment of the Supreme Court of Ohio upon the case of *Norwood* v. *Baker*. In the latter case, the Village of Norwood, in the State of Ohio, acquired by condemnation proceedings in the Probate Court a strip of land through Baker's property, for street purposes, and paid therefor the amount found by the jury to be its value, to-wit, $2,000. An ordinance was then passed by the village assessing against the remaining property of Baker on both sides of the strip appropriated the entire cost of the condemnation, to-wit, $2,000 representing the purchase price, and $218.58 being the cost of the condemnation proceedings, in all the sum of $2,218.58. This court enjoined the collection of that assessment, holding that an exaction for a public improvement in substantial excess of the special benefits accruing to the property was, to the extent of such excess, a taking of private property without compensation; and that the assessment in that case made by the front foot rested upon a basis which excluded any consideration of benefits, the Village of Norwood manifestly proceeding upon the theory that the abutting property could be made to bear the whole cost of the entire improvement whether it was benefited or not to the extent of such costs.

There is no similarity between the facts in the *Norwood-Baker* case and those in the case at bar. The important distinctions between the two cases are as follows:

1. The total assessment was apportioned between Henkel's property and the city at large.

In the *Norwood-Baker* case, the appropriation, for street purposes, was of a strip of land *through the center of plaintiff's property*, and his remaining lands on either side were assessed not only for the entire value of the strip taken, but for the cost of the condemnation proceedings. As this court said in that case:

"It will not escape observation that if the entire cost incurred by a municipal corporation in condemning land for the purpose of opening and extending a street can be assessed back upon the abutting property, without inquiry in any form as to the special benefits received by the owner, the result will be more injurious to the owner than if he had been required, in the first instance, to open the street at his own cost, without compensation in any respect for the land taken for the street; for, by opening the street at his own cost, he might have saved at least the expense attending formal proceedings of condemnation."

In the case at bar the land taken for street purposes is a strip thirty feet in width off the end of Henkel's lot, and the assessment against him is *less than one-half of the cost of this appropriation;* the other one-half of the value of the land taken being a net compensation to Henkel, and borne by the City of Cincinnati at large.

2. The facts raise no presumption that the assessment and the benefits were not equalized.

In the *Norwood-Baker case* there was no possible equalization of the benefits and the assessment, for the reason that the property owner was required to pay the full value for street purposes of the land taken, besides the cost of the condemnation proceedings. The jury in the condemnation proceedings having determined that the value of Baker's property appropriated was $2,000, it is evident that the assessment against him of $2,218.58 was an assessment in excess of the benefits resulting from the opening of the street. Indeed, it was in excess of the total value of the street itself, either to Baker or to the village at large. If the property assessed had not belonged to Baker, its owner could for $2,000 have purchased from Baker the ground desired for street purposes and dedicated it to the public. Thus it is evident that the value of the land is the maximum limit of the benefits conferred upon abutting property by its appro-

priation to public use. To put it in another way: the benefit to the abutting property owner of the opening of a new street cannot, in the nature of things, exceed the value for street purposes of the land taken, and if the assessment upon him is for a sum in excess of the value of the land appropriated, it is manifest that such assessment was levied without regard to any resulting benefits to him.

In the case at bar the value of Henkel's property taken for street purposes was fixed by the jury at $40 per front foot, making the sum paid to him as compensation for the taking $1,200. Council determined to assess against his remaining property, abutting on the improvement, the sum of $714.33 as *his proportion of the cost of the improvement.* These facts certainly do not raise a presumption that there was no equalization of the assessment to the special benefits conferred, or that the assessment was in substantial excess of the benefits.

3. The record shows a consideration by council of the question of special benefits.

In the *Norwood-Baker* case nothing appears to show a determination by council in its appropriating ordinance that the abutting property was specially benefited by the improvement. In the case at bar the appropriating ordinance provided in its second section that the amount found by the jury as the value of the property taken, together with the costs of the proceeding, should be assessed per front foot "upon the lots and lands bounding and abutting upon that part of Hopson street included within the above description, the said lots and lands being hereby declared to be the lots and lands which will be specially benefited by said appropriation, according to the laws and ordinances on the subject of assessments." (Record, p. 9.) As counsel for the plaintiff in error say in their brief, at page 6:

"The City of Cincinnati by its council *declared* by its ordinance of December 31, 1899, that the lots and lands bounding and abutting upon the strip of ground to be appropriated were the lands which would be *specially benefited by said appropriation.*"

4. There is nothing in the Record to show that the excess of the assessment over the benefits, if any, is substantial or material.

In the *Norwood-Baker* case the excess of the assessment over the special benefits was clearly substantial. There the one abutting property owner was obliged to pay the entire cost of the strip of land taken for street purposes, as well as the expenses incident to the appropriation. Manifestly, this was an assessment in substantial excess of special benefits, for the greatest possible benefits that can be calculated, from the appropriation of land for street purposes is the value of the land taken, and Baker was assessed not only for this but for a sum in addition thereto, to wit, for the costs of the appropriation.

In the case at bar the total cost of the land condemned, including the expenses of the proceedings, is $1,457.80, and the assessment against the plaintiff in error is $714.33, the balance being borne by the city at large under the conditions of the assessing ordinance. These figures certainly raise no presumption that the assessment is in substantial excess of the benefits. A simple computation will show that the assessment against Henkel's remaining property bears no unreasonable or unjust proportion to the value of the property assessed. According to the verdict of the jury in the condemnation case, the strip of land taken was worth $40.00 per foot. At this rate the remainder of Henkel's lot upon which the assessment falls, being 198 feet wide, is worth $7,920.00. Upon this property an assessment was levied of $714.33. This is *less than ten per cent of the value of the property.* It cannot

seriously be contended that the opening of the street will fail to benefit an abutting lot to the extent of ten per cent of its value.

This court in the *Norwood-Baker* case say in the second syllabus thereof:

"The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation; but, unless such excess of cost over special benefits be of a material character, it ought not to be regarded by a court of equity, when its aid is invoked to restrain the enforcement of a special assessment."

The plaintiff in error is asking a court of equity to restrain the enforcement of a special assessment, and we submit that there is no showing whatever that the excess of the assessment he complains of over the special benefits conferred upon his property is of a material character. On the contrary, the record shows by the figures themselves that the assessment upon Henkel's property bears a reasonable proportion to the value of the property itself, and cannot be in excess of the special benefits conferred, unless we are to assume that abutting property receives no benefits whatever from the opening and improving of new streets.

THE ASSESSMENT WAS LEVIED WITH DUE REGARD TO SPECIAL BENEFITS.

The record in this case shows that in all proceedings taken by the municipality in levying an assessment upon Henkel's property due regard was had to the special benefits to be conferred upon said property by the contemplated improvement. The condemnation ordinance (Record, pp. 8, 9) declares that the cost of the appropriation shall be assessed upon the lots and lands bounding upon that part of Hopson

street included within the described lines, the said lots and lands being in the language of the ordinance "hereby declared to be the lots and lands which will be specially benefited by said appropriation, according to the laws and ordinances on the subject of assessments." This was passed December 31, 1889.

Thereafter, on September 21, 1892, the assessing ordinance was passed (Record, pp. 9, 10). In this ordinance it is clear that a determination was had by the municipal authorities upon the question of benefits, for the total cost of the improvement is apportioned between the city and the private owner whose lands abut the improvement. *There is nothing in the record to show that this apportionment was not made after due inquiry.* The condemnation ordinance had provided that the assessment should be made "according to the laws and ordinances on the subject of assessments," and it must be assumed, in the absence of any showing to the contrary, that the municipal authorities observed and did not violate the laws and ordinances on the subject of assessments.

The statutes of Ohio require a consideration of benefits.

The statutes of Ohio on this subject provide that special assessments depend for their validity upon the theory that special benefits are conferred upon the property assessed. It is unlawful under the Ohio statutes to levy a special assessment in excess of the special benefits. These laws were in force at the time the assessing ordinance in the case at bar was passed.

Section 2271 of Bates Annotated Ohio Statutes is as follows:

"In cities of the first grade of the first class, and in corporations in counties containing a city of the first grade

of the first class, the tax or assessment specifically levied or assessed upon any lot or land for any improvement shall not, except as provided in section 2272, exceed twenty-five per centum of the value of such lot or land after the improvement is made, and the cost exceeding that per centum shall be paid by the corporation out of its general revenue; and except, as provided in section 2272, there shall not be collected of such assessment in any one year more than one-tenth of such value of the property on which the assessment is made; and in cities of the third grade, first class, the tax or assessment specially levied or assessed upon any lot or land for any improvement, shall not, except as provided in section 2272, exceed twenty-five per centum of the value of such lot or land, as determined by the council in advance of the assessment or at the time of making the same, which valuation shall not exceed a fair market value of such lot or lands after the improvement is made, and the cost exceeding that per centum shall be paid by the corporation out of its general revenue; and, except as provided in section 2272, there shall not be collected of such assessment in any one year, more than one-tenth of such value, of the property on which the assessment is made; and whenever any street or avenue is opened, extended, straightened or widened, the special assessment for the cost and expense, or any part thereof, shall be assessed only on the lots and lands bounding and abutting on such part of such street or avenue so improved, and shall include of such lots and lands only to a fair average depth of lots in the neighborhood, but shall also include other lots and parts thereof and lands to such depth; and whenever at least one-half in width of any street or avenue has been dedicated to such purpose from the lots and lands lying on one side of the line of such street or avenue, and such street or avenue is widened by taking from the lots and lands on the other side thereof, no part of the cost and expense thus incurred shall be assessed on the lots and lands lying on said first-mentioned side, but only upon the other side, and as aforesaid, *but said special assessment shall not be in any case in excess of benefits;* provided, that in any case in which a street or avenue is opened, extended, straightened or widened, a part of the cost and ex-

pense thereof, not in excess of benefits, may be assessed upon the lots and lands bounding and abutting on any such other part, or said "first-mentioned side" of such street or avenue, or of any intersecting street or avenue, as the owners of a majority of the feet front thereof have petitioned for such improvement and consented in such petitions to be so assessed; also provided, that nothing in this section contained shal apply to any improvement ordered commenced or completed prior to the passage of this act."

It will be observed that this section distinctly declares that no special assessment in any case shall be in excess of benefits.

Section 2264, Bates' Revised Statutes, is as follows:

"In the cases provided for in the last section, and in all cases where an improvement of any kind is made, except in cities of the second grade of the first class, of an existing street, alley or public highway, the council may decline to assess the costs and expenses in the last section mentioned or any part thereof, or the costs and expenses or any part thereof of such improvement, except as hereinafter mentioned, on the general tax list, in which event such costs and expenses or any part thereof which may not be so assessed on the general tax list, shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion to the benefit which may result from the improvement, or according to the value of the property assessed, or by the foot front of the property bounding and abutting upon the improvement, as the council by ordinance setting forth specifically the lots and lands to be assessed may determine before the improvement is made, and in the manner and subject to the restriction herein contained, provided, however, that in cities of the fourth grade of the second class, which by the federal census of 1890 had and those which by any subsequent federal census may have a population of not less than seven thousand six hundred and ninety (7,690) nor more than seven thousand seven hundred (7,700) the council may assess one-third of the costs and expenses

of making any such improvement upon the general tax duplicate of such city, and two-thirds thereof against the bounding and abutting lots and lands according to the foot front, and in either such case the assessments shall be payable in one or more installments, and at such times as the council may prescribe; but this section shall be subject to the provisions of chapter two of this division, and in cities of the first and third grades of the first class, at the time when the council determines that the cost of such improvement is to be assessed as above provided, it shall also determine in how many installments said assessments shall be payable; at what intervals, if payable in more than one installment; also whether or not bonds shall be issued in anticipation of such assessment; and when bonds are issued in anticipation of the collection of such assessment, the interest accrued and to accrue on said bonds shall be considered and treated as part of the costs and expenses of such improvement for which assessments may be made. In cities of the third grade of the first class, such assessments, when made, shall become due and payable at the time and in the manner provided by the council, and if said assessments or any installment thereof shall not be paid at the time the same becomes due, a penalty of fifteen (15) per centum shall thereupon attach to such unpaid assessment or installment, and thereafter such unpaid assessment or installment shall bear interest until the payment thereof at the same rate as the bonds issued in anticipation of the collection of such assessment; and the county auditor shall, annually, place upon the tax duplicate the penalty and interest herein provided for. When the council of said cities of the third grade of the first class shall determine to issue bonds in anticipation of the collection of assessments provided for in this section or required by section twenty-two hundred and seventy-four (2274), the provisions of section two thousand seven hundred and two (2702) shall not apply; nor shall said section 2702 apply when a part, not in excess of one-third of the cost and expenses of any such improvement or appropriation is to be paid by any such city by levy or assessment upon the general tax list, issue of bonds, or otherwise, as may be provided by law; and any such city of the third grade of the first

class is hereby authorized to issue and sell its general street improvement bonds at a rate for interest not in excess of five (5) per cent per annum, payable semi-annually, to pay for the city's part or share as aforesaid, of the cost and expense of any such improvement or appropriation, and may levy taxes, in addition to the tax now by law authorized to be levied therein or make assessments as provided in the preceding section to pay such bonds and interest thereon. When the council of cities of the second class and third grade and cities of the second class and third grade (a) determine to issue bonds in anticipation of the collection of assessments to pay the costs and expenses of appropriating lots and lands for the purpose of laying off, opening, extending or widening a street, alley or other public highway, the provisions of section twenty-seven hundred and two (2702) shall not apply."

It will be observed that this statute presupposes an inquiry by council into the question of benefits, since it authorizes an assessment upon the "abutting and such adjacent and contiguous *or other benefitted lots and lands in the corporation*, either in proportion to the benefit which may result from the improvement, or according to the value of the property assessed, or by the foot front of the property bounding and abutting upon the improvement, as the council by ordinance setting forth specifically the lots and lands to be assessed may determine before the improvement is made," etc. Thus, it is clear that under this section, whether the assessment is made "in proportion to the benefit," or "according to the value of the property assessed," or "by the foot front of the property bounding and abutting upon the improvement," in either case the assessment can only be upon "such adjacent and contiguous or other benefited lots and lands," etc. That is to say, that no matter whether the assessment be in proportion to the benefits, or according to the value of the property assessed, or by the foot front, yet it can only be levied upon the *benefitted property*.

Section 2283, Bates' Revised Statutes, is as follews:

"Special assessments, whether by the feet front or otherwise, shall be so restricted that the same territory shall not be assessed for making two different streets or avenues, within a period of five years, in such amounts that the maximum assessment herein provided will be thereby exceeded; and so far as practicable under the provisions of this title, regard must be had, in making special assessments, to the probable benefits of the property assessed."

It will be observed that this section provides that so far as practicable under the provisions of this title, that is to say, under the general provisions upon the subject of assessments, "regard must be had, in making special assessments, to the probable benefits to the property assessed."

Thus we have the statutes of Ohio distinctly providing that in every case where a special assessment is levied for a public improvement, whatever plan or method is adopted in determining the area of the taxable district or the particular lots upon which the burden shall fall, due consideration must be given to the question of special benefits. If, as in the *Norwood-Baker* case, the record discloses that no such consideration could have been given, since the assessment was levied upon one lot alone and was manifestly in substantial excess of possible benefits, there is no presumption of legality and regularity in the proceedings to be overcome by the property owner aggrieved. If, however, as in the case at bar, the facts disclosed in the record itself raise the presumption that due regard was had to the consideration of benefits, this presumption must be overcome by some showing on the part of the plaintiff in error that the plain mandates of the statutes were disregarded by the municipality.

The Supreme Court of Ohio has construed these sections to require a consideration of benefit.

These statutes have been frequently passed upon by the

Supreme Court of Ohio, and the holdings have been uniformly to the effect that no special assessment can be legally levied except upon the basis of the special benefits to the property assessed. In other words, that construction has been put upon them which would make them constitutional, and not that which would make them unconstitutional.

In the case of *Meissner et al.* v. *The City of Toledo et al.*, 31 Ohio St. 386, the Supreme Court of Ohio held that in levying a special assessment to pay the cost and expense of lands appropriated for the extension of a street, the city council was bound to regard special benefits conferred upon the property assessed, and was authorized to appoint a committee of disinterested freeholders to ascertain the special benefits as provided in section 2277, Bates' Revised Statutes (section 284, Municipal Code of Ohio, 66 Ohio L. 284). *There is nothing in the record of the case at bar to show that such an inquiry was not made.* The only facts disclosed by the record are that council determined to levy this assessment according to the "laws and ordinances on the subject of assessments," and that the amount charged against the property of the plaintiff in error was less than one-half the total cost of the improvement.

In the case of *Chamberlain* v. *The City of Cleveland et al.*, 34 Ohio St. 551, the Supreme Court of Ohio in the first and second syllabi say:

"1. To enable a municipal corporation to pay for a local public improvement it may, by assessment, take from an individual whose lands are subject to assessment and specially benefitted by the improvement, such a portion of the costs thereof as is the equivalent, but not in excess of the special benefits conferred thereby.

"2. The whole amount of the assessment must be apportioned amongst the several lots and parcels of land specially benefited, in the proportion that the special benefit to each lot or parcel bears to the whole special benefits conferred by the improvement."

In the case of *Walsh* v. *Barron*, 42 W. L. B. 302, the Supreme Court of Ohio, in the first syllabus, say:

"The fundamental principle underlying an assessment made on property for the cost and expense of a local public improvement is, that the property is specially benefited by the improvement beyond the benefits common to the public, and that a ratable assessment of the property to the extent of these benefits violates no constitutional right of the owner, and is just and proper. But it can in no case exceed the benefits without impairing the inviolability of private property."

This last case was decided after the final determination of the case of *Norwood* v. *Baker*. The Supreme Court of Ohio having in view the *Norwood-Baker* decision, as well as its own long line of decisions on the subject of special assessments, say at page 304:

"Upon the admitted averments of the pleadings the naked question here presented is, whether an assessment may be made upon the property of an owner for the cost of a public improvement, that is not only in excess of the benefits conferred on it, but of its value with the benefits added by the improvement. We do not think this can be done where the party complaining in no way promoted the improvement. By no refinement of reasoning can it be construed to be anything else than the taking of private property for public use without compensation. According to the best considered of the modern cases, and the most reliable authorities, an assessment, being sustainable only on the theory of special benefits conferred on the land by the improvement over those received by the general public, is *necessarily limited to the value of the benefits so conferred. The value of the entire benefits so conferred may be assessed upon the land for the cost of the improvement; more, however, cannot be exacted, without impairing the inviolability of private property, guaranteed by the constitution, or in other, if not more appropriate words, confiscating it.*"

In the *Norwood-Baker* case, *more than the value of the entire improvement* was assessed upon the one property owner, since the plaintiff in that case was asked to pay not only the full value for street purposes of the land taken as determined by the jury in the condemnation proceedings, but the cost of such proceedings in addition. In the case at bar, less than one-half the value of the entire benefits conferred by the opening of the street are assessed upon the property of the plaintiff in error.

We submit that neither in the method employed nor in the results as shown by the record is there any basis for the claim that no regard was had to the special benefits conferred upon Henkel's property, or that such special assessment exceeded substantially, materially or to any extent whatever the special benefits conferred.

CONCLUSION.

We do not apprehend that it is the purpose of this court to enlarge the effect of the opinion in the *Norwood-Baker* case beyond the points therein decided. We submit that the principles laid down in that case do not apply where no presumption arises from the record that the municipal authorities failed to obey the law which requires that no special assessment shall exceed the special benefits conferred, and, particularly, where the record shows that such special assessment is not in substantial excess of the special benefits.

In the *Norwood-Baker* case this court expressly declined to overrule former opinions which had sustained special assessments, such as the one here in question, restricting its decision to the extraordinary facts there presented.

In *Spencer* v. *Merchand*, 125 U. S. 345, this court say:

"The legislature in the exercise of its power of taxa-

tion, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading, or repairing of streets, to be assessed upon the owners of land benefited thereby; and the determination of the territorial district which should be taxed for a legal improvement is within the province of legislative discretion."

In *Williams* v. *Eggleston*, 170 U. S. 304, this court say:

"Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement."

In the present case the record shows that under the authority granted by the legislature the city council of the City of Cincinnati declared what lots and lands should be considered as specially benefited by the improvement. Not only this, but when the municipal authorities came to pass the assessing ordinance, it appears from the record that some determination must have been had upon the subject of benefits, since the total cost of the improvement is so apportioned upon the benefited lands that the property of the plaintiff in error bears less than one-half the burden. The mere fact that the assessment was levied by the front foot upon Henkel's lot furnishes no evidence that regard was not had to the special benefits, or that the assessment exceeded the benefits. Whether the total amount assessed against the property of an individual owner is calculated at so much per front foot or is expressed in a lump sum can make no difference in the essence of the thing done. In either case the sum total he is called upon to pay may represent, and, if the statutes and constitution of the state are obeyed, *must* represent, the special benefits conferred upon the property assessed.

In *Parsons* v. *The District of Columbia*, 170 U. S. 45, the court sustained an act of congress in respect to the District

of Columbia, not only determining the area benefited by a public improvement, to wit, the ground fronting on the street in which the improvement was made, but also assessing the cost of such improvement at a specified rate, to wit, $1.25 per front foot, on such area.

We respectfully submit that the record in this case, unlike that in the case of *Norwood* v. *Baker*, neither makes any showing nor raises any presumption that the method employed in levying the assessment here sought to be enjoined precluded an inquiry into the benefits conferred upon the property of the plaintiff in error, or that such inquiry was not in fact made, or that the assessment determined upon was in substantial excess of said benefits. On the contrary, the record shows or at least raises the presumption that the assessment represents the special benefits conferred, was determined upon after due and proper consideration, in obedience to the laws of the state, and violates no provision of the federal constitution.

The judgment of the Supreme Court of Ohio should be affirmed.

Respectfully submitted.

ELLIS G. KINKEAD,
WADE H. ELLIS,
Corporation Counsel for
The City of Cincinnati.

MARCH 5, 1900.

HENKEL *v.* CINCINNATI.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 206. Argued March 20, 21, 1900. — Decided April 9, 1900.

Dismissed on the authority of *Sayward* v. *Denny*, 158 U. S. 180, 183, and other cases cited in the opinion of the court.

THE case is stated in the opinion of the court.

Mr. L. Benton Tressing for plaintiff in error.

Mr. Wade H. Ellis and *Mr. Ellis G. Kinkead* for defendant in error.

Opinion of the Court.

THE CHIEF JUSTICE: Bill for injunction to restrain collection of a special assessment filed in Court of Common Pleas, Hamilton County, Ohio, and on hearing dismissed. Carried by appeal to circuit court of Hamilton County, heard there, and again dismissed. Appealed to Supreme Court of Ohio, and the judgment of the circuit court affirmed June 14, 1898, it being ordered "that a special mandate be sent to the circuit court of Hamilton County to carry this judgment into execution." June 21, "mandate issued," and "original papers sent to clerk." Opinion, 58 Ohio St. 726: "Judgment affirmed on authority of *Cleveland* v. *Wick*, 18 Ohio St. 303."

January 6, 1899, the Chief Justice of the Supreme Court of Ohio made and signed a certificate that the question whether the assessment was in violation of the Fourteenth Amendment was submitted to the court, and that the court decided that it was not.

The record does not show that any Federal question was raised prior to judgment, but it appears in the petition for writ of error from this court, and accompanying assignment of errors. The certificate of the Chief Justice could not confer jurisdiction. *Parmelee* v. *Lawrence*, 11 Wall. 36; *Powell* v. *Brunswick County*, 150 U. S. 433, 439; *Dibble* v. *Bellingham Bay Land Company*, 163 U. S. 63, 69.

The writ of error is dismissed on the authority of *Sayward* v. *Denny*, 158 U. S. 180, 183; *Ansbro* v. *United States*, 159 U. S. 695; *Oxley Stave Company* v. *Butler County*, 166 U. S. 648; *Miller* v. *Cornwall Railroad Company*, 168 U. S. 131; *Keokuk and Hamilton Bridge Company* v. *Illinois*, 175 U. S. 626.